

NICHOLAS GWINYAI MUCHIRAHONDO  
versus  
CAROL BERE  
and  
SPARKLES PROPERTIES  
and  
REGISTRAR OF DEEDS N.O.

HIGH COURT OF ZIMBABWE  
GOWORA J  
HARARE, 31 May, 30 November and 7 December 2011

### **Opposed Court Application**

*T R Hove*, for the applicant  
*D Ochieng*, for the 1<sup>st</sup> respondent  
No appearance for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents

GOWORA J: At the commencement of the hearing Miss *Hove* moved for an amendment to the draft order which was granted by consent. This matter came to me by way of an urgent chamber application. After the first respondent had filed her opposing papers I opined that the matter was not urgent and that it should be set down on my opposed roll.

The background to this dispute is as follows: The applicant and the first respondent were in an adulterous relationship which lasted some years and produced a son bearing the names of the applicant. In order to pursue their relationship the parties set up a house together and lived for some time in a flat together with a son of the first respondent from an earlier union. In time they move to a cottage on a stand where the main structure was still to be completed. It is common cause that the stand was purchased during the life of the relationship and that the property was registered in the name of the first respondent. As is what went on with relationships of this nature it came to an end, the reasons for its termination not being pertinent for present purposes. It has come to the attention of the applicant that the first respondent intends to dispose of the immovable property referred to above and he has as a result launched these proceedings in an effort to stop at least temporarily such disposal.

In terms of the amended draft order the applicant seeks relief in the following terms:

That the first respondent be and is hereby ordered not to sell, transfer or dispose by any means of stand No 2830 Bluffhill Township of Stand 2902 Bluffhill Township without the written consent of the applicant or an order of a competent court.

The third respondent shall register a caveat on the above property which shall only be removed upon the written consent of the applicant or order of a competent court.

The first respondent be and is hereby ordered to pay the costs of this application on an attorney-client scale.

In laying a basis for the relief being sought herein the applicant has stated in the affidavits filed by him that he had contributed US\$100 000-00 towards the costs of completing the construction of the buildings situated on the stand. He has suggested that when he and the first respondent embarked on their relationship, they had agreed, in view of the fact that the applicant was already married, that whatever property was acquired through the vehicle of this relationship would be shared by the parties upon its termination. It is alleged by the applicant that the agreement was that they share any property thus acquired equally. Therefore the applicant has subsequent to instituting these proceedings issued summons wherein he claims fifty percent of the value of the immovable stand.

In argument Miss *Hove* submitted that the applicant's case was based on contract and that consequently he had a clear right in respect of which he sought the protection of this court. Whilst it was accepted that the relationship upon which the alleged contract was premised was regarded by society at large as immoral, it was suggested by Miss *Hove* that in the past the courts have relaxed the *par delicto* rule where a party to the impugned contract had performed his obligations in relation thereto. She made specific reference to a situation where the rule would result in the one being unjustly enriched at the expense of the other party. She argued that in order for a litigant to show that he had a clear right, all that was required was an assessment of whether or not that right was enforceable at law. She further contended that the court must consider, on a balance of probabilities, the existence of the right in light of the contract from which the alleged right emanates from.

Mr *Ochieng* questioned the submission that the applicant's case was based on a clear right. He argued that in order to obtain the interdict the applicant had to establish that he had a

right in the property, but that in his affidavit the applicant alleges that the first respondent owes him money. He further argued that the claim was based on an unenforceable contract. Although it was for the trial judge to decide on the enforceability of the contract, the applicant had to, in this application establish the existence of a contract, that it was enforceable and that a debt had accrued in terms of that contract.

The subject matter to the dispute is an immovable property which is registered solely in the name of the first defendant. That she has a real right in the property is not in dispute. A real right, or *a ius in rem*, is an exclusive interest or benefit enjoyed by a person in a thing. This right is binding on all other persons and cannot be contested or legally nullified by any other person. It follows therefore that for the applicant to establish a clear right in this matter he must show the existence of such contract as would legally permit him to interfere with the first respondent's real right in the property, that is a right that entitles him to interfere with her enjoyment of the property. He has not. He has alleged that based on some contract concluded between them he has an entitlement to claim half of the value of the property. The contract being referred to is the adulterous union that the two had engaged in during the time the property in question was acquired. Assuming that the applicant has established some right, is the contract upon which the claim is premised enforceable?

The first respondent has referred to the contract as being immoral and not capable of enforcement. Mr *Ochieng* has submitted that for this court to give effect to the alleged contract would be to overrule *Dube v Khumalo* 1986 (2) ZLR 103(S). At p 109D-G, GUBBAY JA (as he then was) said:

“There are two rules which are of general application: the first is that an illegal agreement which has not yet been performed, either in whole or in part, will never be enforced. This rule is absolute and admits no exceptions. See *Mathews v Rabinowitz* 1948 (2) SA 876 (W) at 878; *York Estates Ltd v Wareham* 1950 (1) SA 125 (SR) at 128. It is expressed in the *maxim ex turpi causa non oritur actio*. The second is expressed in another *maxim in pari delicto potir est conditio possidentis*, which may be translated as meaning “where the parties are equally in the wrong, he who is in possession will prevail.” The effect of this rule is that where something has been delivered pursuant to an illegal agreement the loss lies where it falls. The objective of the rule is to discourage illegality by denying judicial assistance to persons who part with money, goods or incorporeal rights, in furtherance of an illegal transaction. But in suitable cases the courts will relax the *par delictum* rule and order restitution to be made. They will do so in order to prevent an

injustice, on the basis that public policy “should properly take into account the doing of simple justice between man and man.”

Whilst the relationship that the first respondent and the applicant had was immoral, I do not believe that it can be termed illegal. Adultery is not an offence, it merely opens up the parties thereto to civil suits. The contract that the applicant seeks to have enforced is immoral and although the courts will not enforce such an agreement it may nevertheless grant relief or redress to a party who has actually made performance without receiving from the other party a reciprocal benefit. In *casu*, the applicant merely refers to a contract to share the proceeds of the immoral union in the event that it has terminated. The relief being sought is itself premised on the immoral agreement and I am not convinced that this is relief that a court can grant. To do so would be to clothe the immoral agreement with legality. It would also mean that this court has jettisoned forever the *ex turpi causa* rule. No action can lie from an illegal agreement as it is void of legal effect. In my view the applicant has failed to establish a right for the grant in his favour of an interdict. He has failed at the first hurdle and it becomes unnecessary that I examine the other factors that a court has to consider in an application for an interdict.

In the premises the application is dismissed with costs.

*Hove and Associates*, applicant’s legal practitioners  
*Chingore and Associates*, respondent’s legal practitioners